Supreme Court, U.S.
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No. 99-668

In The

Supreme Court of the United States

October Term, 1999

TIFFANY D. SHAW

Petitioner,

vs.

AUTOZONE, INC.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

There is no parent or publicly held company owning 10% or more of AutoZone stock.

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STATEMENT OF THE CASE

A. There Are No Issues Warranting Review

This Petition for a Writ of Certiorari concerns an affirmance of a summary judgment that was entered in favor of the employer, AutoZone, Inc. ("AutoZone"), in a case of alleged sexual harassment. More specifically, this Petition challenges the Seventh Circuit's application of the affirmative defense established by this Court in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Petitioner, Tiffany Shaw, does not seek to challenge the legality of the defense. Instead, Petitioner asserts the Seventh Circuit should not have applied the defense--contending that under the facts of this case the defense was not satisfied. Petitioner contends the Seventh Circuit should have remanded the case for the District Court to apply the defense rather than deciding the matter itself. Accordingly, this Petition is fact-based, and presents no issue of law for this Court to address. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987) ("A court of law, such as this Court is, rather than a court for corrections of errors in fact finding, cannot undertake to review concurrent findings of fact by two counts below in the absence of a very obvious and exceptional showing of error.")

B. The Specific Allegations of Sexual Harassment Are Not at Issue

In her Statement of the Case, Petitioner highlights the specific instances of alleged sexual harassment; however, the issue before this Court is not whether the harassment took place, or whether such conduct rises to the level of actionable harassment even if it did occur. The District Court granted summary judgment, and the Seventh Circuit affirmed, on the basis that AutoZone could not be liable due to Petitioner's unreasonable failure to take advantage of the corrective

opportunities AutoZone provided by virtue of its sexual harassment complaint procedure. Petitioner's reference to the specific allegations is immaterial at this stage of the proceedings.

C. The Petition Fails to Set Forth in Detail How Petitioner Failed to Report the Alleged Harassment

Petitioner concedes that she did not report the alleged harassment (Petitioner's Brief at 6), but she gives that important fact short shift. A descriptive account of her inaction would be more instructive.

AutoZone is in the automotive parts business. AutoZone employed Petitioner as an assistant store manager in its Rock Falls, Illinois, store beginning in mid-February 1995, until June 6, 1995. (R. 28, App. at 6, 15.) Donald A. Noble became the store manager of AutoZone's Rock Falls store around May 1993, and remained in this position during the entire period in 1995 when AutoZone employed Petitioner. (R. 28, App. at 21-22.)

AutoZone's employee handbook, which was in effect during Petitioner's employment with AutoZone, prohibits sexual harassment and states that an employee who believes he/she is a victim of sexual harassment should report the offending behavior to his/her Store Manager, Area Advisor, District Manager, or directly to the director of personnel services or the Equal Employment Opportunity Manager in Department 8029 at AutoZone's corporate headquarters in Memphis, Tennessee. (R. 28, App. at 36-37, 42-45.) Petitioner received a copy of this handbook on February 14, 1995, as evidenced by the acknowledgment form she signed that is retained in her personnel file. (R. 28, App. at 36-37.) Petitioner never contacted anyone who worked for AutoZone in any capacity regarding the

alleged sexually harassing behavior of Donald Noble. (R. 28, App. 10, 14.) Petitioner testified that during her employment with AutoZone, from February to June 1995, she saw Noble's supervisor, Dave Hunsche, in the store every two to three weeks. Petitioner also attended a manager's meeting, which District Manager Steve Lang and all of the other managers in the area attended in March 1995. Steve Lang also accompanied the AutoZone Vice President on a visit to the Rock Falls store in May 1995; however, Petitioner did not, on any of these occasions, complain that Mr. Noble sexually harassed her. (R. 28, App. at 8-10, 14.)

After Petitioner quit, Mr. Hunsche attempted to contact her on three separate occasions in order to conduct an exit interview to determine why she quit. Petitioner did not return Mr. Hunsche's calls or meet with him. (R. 28, App. at 33.) Mr. Hunsche had no knowledge that Petitioner ever claimed that she was sexually harassed while working at AutoZone until three months after she quit and EEOC administrative proceedings had commenced as a prelude to the instant action. (R. 28, App. at 32, 34.)

D. Petitioner Incorrectly States Why the Seventh Circuit Applied the Affirmative Defense

Petitioner states that the Seventh Circuit held that an employee's failure to use an employer's complaint procedure will always satisfy the employer's burden under the second element of the affirmative defense (Petitioner's Brief at 8). Petitioner further states that the parties should have an opportunity to develop the record on the issue of whether Petitioner's decision not to report sexual harassment was reasonable (Petitioner's Brief at 9). The Seventh Circuit affirmed the summary judgment on de novo review because it had sufficient evidence to apply the affirmative defense. *Shaw v. AutoZone*, 180 F.3d. 806, 813 (7th Cir. 1999). Petitioner had

already answered comprehensive questions at her deposition about the sexual harassment complaint procedure and the reasons for her abject failure to report the alleged harassment. Petitioner's argument that it was reasonable for her not to follow AutoZone's complaint mechanism because she did not feel comfortable speaking to anyone at AutoZone about the alleged conduct was specifically rejected by the court. The court acknowledged Petitioner's argument, but concluded that, "an employee's subjective fears of confrontation, unpleasantness or retaliation do not alleviate the employee's duty under *Ellerth* to alert the employer to the allegedly hostile environment." *Shaw*, 180 F.3d at 813. The Petitioner is wrong to say that the Seventh Circuit incorrectly applied the affirmative defense because it did not have the facts necessary to do so is incorrect. The Seventh Circuit considered Petitioner's failure to complain, as well as her reasons for that failure, when it applied the affirmative defense in favor of AutoZone.

REASONS FOR DENYING THE WRIT

I. Petitioner Failed to Do Anything to Report the Alleged Harassment, and Given That Fact, Her Inaction was Unreasonable and There is Nothing for This Court to Consider

Petitioner correctly states that this Court established an affirmative defense to claims of sexual harassment by supervisors when the employee has suffered no tangible employment action. More specifically, this Court held in *Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998)* and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), that the employer is protected from liability when it can show: (1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) that the

plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. Petitioner concedes that she suffered no tangible employment action (Petitioner's Brief at 5), so this is a case in which the affirmative defense is applicable. Petitioner concedes that AutoZone had an anti-sexual harassment policy with multiple reporting mechanisms (Petitioner's Brief at 6), thus satisfying the first prong of this defense. Petitioner further concedes that she failed to report the alleged harassment. (Petitioner's Brief at 6). Petitioner argues, however, that it is not always unreasonable for an employee to fail to report alleged sexual harassment, and that this case should be remanded to the District Court to consider whether her silence was reasonable. AutoZone respectfully suggests that Petitioner's utter failure to do anything to notify management is precisely what the Supreme Court contemplated when it established the affirmative defense insulating employers from liability. Therefore, Petitioner's request for review should be denied.

The evidence plainly establishes that Petitioner did absolutely nothing to take advantage of the opportunities AutoZone gave her to complain and offered no plausible explanation for her failure to do so. In order to understand how unreasonable Petitioner was, the language of the policy itself should be considered, as that demonstrates how allegedly aggrieved employees were urged to come forward. This policy reads in pertinent part as follows:

> **Sexual Harassment**
>
> AutoZone will not tolerate sexual harassment. Such conduct or the encouragement of such conduct may result in termination.

AutoZone's stance on this issue extends to all AutoZoners, as well as people outside AutoZone that we do business with -- our customers, suppliers and vendors. Every AutoZoner needs to be aware of AutoZone's sexual harassment policy.

Sexual harassment means unwelcome sexual advances, verbal or physical. Sexual harassment occurs when:

- Submission to such conduct becomes, either explicitly or implicitly, a term or condition of employment.

- Submission to, or rejection of, such conduct by an individual becomes the basis for employment decisions affecting any individual.

- Such conduct interferes with your work or creates an uncomfortable working environment.

The *bottom line is, all AutoZoners should be treated with respect and AutoZone as a company will not tolerate anything less.*

We want you to know that AutoZone is committed to having a cooperative and harassment-free work environment. AutoZoners who may have been subject to sexual harassment should notify the store Manager at once or report the situation directly to the AA or the DM. The AutoZoner may also directly contact the Director of Personnel Services or the

> Equal Employment Manager at Mail Station 8029.
>
> Any AutoZoner who receives a complaint or becomes aware of a sexual harassment situation, should report the allegation *immediately.* Management action will be taken to investigate each reported allegation thoroughly in as confidential a manner as possible.

(R. F8, App. at 42-44.)

Petitioner's deposition testimony proves that she was unreasonable in failing to act. Petitioner testified that she never reported the alleged harassment to anyone at or above her immediate supervisor's level in the company, and that she did not take steps to avail herself of corrective and preventative measures at place at AutoZone:

> Q. Did you tell Mr. Noble that you were offended by that [his alleged comments on inventory trips]?
>
> A. No.
>
> Q. Why not?
>
> A. I just wanted it to go away.
>
> Q. And you thought that if you asked him to stop that it would not go away?
>
> A. Correct.
>
> Q. But you never tried to stop it that way, did you?

A. He was my employer.

Q. The question is you never attempted to have him stop by speaking out against it, did you?

A. No.

Q. And you didn't call anybody from that trip higher up in management to report what was going on, did you?

A. No.

Q. Did you tell anybody at the store -- I'm talking about employees at the store now -- that Mr. Noble made you feel upset or uncomfortable?

A. No.

Q. Is there any reason why you didn't speak up?

A. I didn't feel that I could trust any of the other employees to speak to them on that kind of level.

Q. And as you've already told me you didn't see fit to go over Mr. Noble's head in the company hierarchy to complain, true?

A. Correct.

(R. 28, App. at 10, 14.) (Emphasis added.)

Pursuant to the *Ellerth* decision, courts have consistently held that an employee who does nothing to report the alleged harassment has unreasonably failed to take advantage of the employer's opportunities to correct the problem. Hence, the Seventh Circuit's holding in the case sub judice is proper.

Scrivner v. Socorro Independent School District, 169 F.3d 969 (5th Cir. 1999), involved an elementary school teacher who sued the school district and the school principal for sexual harassment and retaliation in violation of Title VII. The school superintendent received an anonymous letter, from someone other than the plaintiff, complaining about the principal's sexually harassing behavior and vulgar comments. The school board immediately launched an investigation. In the context of that investigation the school board questioned the plaintiff about the principal's conduct, but the plaintiff denied the principal's conduct was sexually harassing or vulgar. She did not disclose the principal's inappropriate actions toward her. Four months later; however, the plaintiff filed a formal complaint with the school district regarding the principal's behavior.

The school district promptly investigated the complaint and removed the principal from his position. Nevertheless, the teacher filed her lawsuit. The school district filed a motion for summary judgment on the basis that the plaintiff had unreasonably failed to avail herself of the school district's preventative and corrective sexual harassment policies (the affirmative defense recognized by *Ellerth/Faragher*). The district court granted the motion and the plaintiff appealed. *Scrivner*, 169 F.3d at 971. The Fifth Circuit held that the plaintiff was unreasonable in failing to inform the school district of the principal's conduct when given an express opportunity to do so. For that reason, the employer successfully proved the affirmative defense to Title VII liability for the school principal's harassing behavior.

Even when an employee does complain about sexual harassment, the employer may still be successful in proving the second prong of the *Ellerth/Faragher* affirmative defense. In *Montero v. Agco Corp.*, 192 F.3d 856 (9th Cir. 1999), the plaintiff received several copies of the sexual harassment policy, and knew whom to contact if she believed she was sexually harassed. Despite that fact, the plaintiff waited nearly two years before complaining to the company's human resources department about sexual harassment. Once the plaintiff did complain, the company promptly responded by investigating the plaintiff's complaint and taking disciplinary action against the alleged harassers. Because the plaintiff waited so long to complain, the employer successfully met the second prong of the *Ellerth/Faragher* defense by showing the plaintiff "unreasonably failed to take advantage of the company's preventative and corrective opportunities earlier, although she knew of their existence." *Montero,* 192 F.3d at 863.

Mandy v. Quad/Graphics, Inc., 49 F.Supp.2d 1095 (E.D. Wis. 1999) is another example of an employee's unreasonable failure to take advantage of the employer's preventative and corrective opportunities. In that case, the plaintiff delayed almost two years before reporting a supervisor's sexual harassment. The court noted that had she reported this conduct immediately, or at least sooner, much of the harassment could have been avoided. The plaintiff attempted to explain her delay in reporting the harassment by claiming that she was afraid of retaliation from the supervisor; however, the court rejected that argument, pointing out that the company's anti-harassment policies and procedures would have protected her. The court observed that the Supreme Court placed the burden on the employee to report harassing conduct "before it becomes severe or pervasive,..." *Id.* at p. 1111, quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). The court held that the

plaintiff's failure to come forward sooner established the company's affirmative defense.

Petitioner has cited no testimony from the record, nor has she explained by way of argument, why her utter silence and inaction should be excused as reasonable. The Supreme Court has held that the second prong of the affirmative defense is established when the employee has unreasonably failed to take advantage of the employer's corrective opportunities. It is difficult to envision a set of facts whereby an employee could have been any more unreasonable than the Petitioner in this case. AutoZone implemented a complaint procedure so that it would have the opportunity to correct such behavior, and this Petitioner failed to report the harassment. This thwarted any opportunity AutoZone would have had to correct such allegedly harassing behavior. There is no reason to remand the case for the District Court to consider whether, as a matter of law, Petitioner's absolute failure to report the alleged harassment could be construed as reasonable.

Petitioner argues that the Supreme Court ruled in *Ellerth/Faragher* that the reasonableness of an employee's failure to report the alleged harassment is a question of fact that necessitates a remand to the district court for determination. Petitioner is incorrect. The Supreme Court did not state that the issue of the Petitioner's reasonableness is a fact issue precluding summary judgment. Rather, the Supreme Court stated that: "[w]hile proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). This statement actually lessens the burden on AutoZone in its proof of the affirmative defense, rather than requiring remand for further

consideration. This pronouncement means that an employer such as AutoZone can prove the employee acted unreasonably even without showing the employee failed to utilize the reporting procedure of its sexual harassment policy. If the employer can prove that the employee unreasonably failed to complain, that should be sufficient to establish the affirmative defense. AutoZone has proven that Petitioner did nothing whatsoever to take advantage of the opportunities it afforded her to correct the alleged harassment, and thus, Petitioner's writ application should be denied.

II. The Supreme Court Applied the New Affirmative Defense in *Faragher* Without Having to Remand, and Thus, the Seventh Circuit in the Instant Case Acted Appropriately in Applying the Defense Rather Than Remanding the Case

Petitioner argues that the Seventh Circuit should not have applied the *Ellerth/Faragher* defense itself, but rather, should have remanded the case so that the District Court could apply the defense. Petitioner reasons that at the time the summary judgment was entered by the District Court, the Supreme Court had not yet established the affirmative defense in *Ellerth/Faragher*, and thus, a remand is necessary. Petitioner's argument is fallacious in two respects.

First, although it is true that the *Ellerth/Faragher* defense had not yet been established at the time the District Court entered summary judgment, the issue of whether or not Petitioner had utilized the complaint procedure was at issue before the District Court. The District Court applied a negligence standard in granting the motion for summary judgment holding that because Petitioner did not complain, AutoZone had no reason to know of the alleged harassment. The Supreme Court later held in *Ellerth/Faragher* that the employer is vicariously liable, without regard to its own

negligence, unless the employer can prove the new affirmative defense. But even though the Supreme Court had not yet decided *Ellerth/Faragher*, Petitioner's failure to utilize the complaint procedure was still at issue for purpose of the negligence issue: whether AutoZone knew or reasonably should have known of the alleged harassment. All questions pertaining to Petitioner's failure to utilize the complaint procedure, indeed her failure to notify anyone in management in any way of the alleged harassment, was fully developed during the discovery stage in the District Court. Remanding the case for further discovery would be pointless, because unless Petitioner is suggesting that she would now change her testimony to defeat the affirmative defense (which she has not said), discovery pertaining to that affirmative defense has already been accomplished.

Second, there is authority in support of the Seventh Circuit's decision to consider the affirmative defense on appeal, rather than remand the case, and Petitioner's argument fails for that additional reason. As the Court of Appeals noted in its decision below, the Supreme Court in *Faragher* applied the new affirmative defense to the facts as previously developed by the parties at the district court stage. The Supreme Court decided the *Faragher* case without remanding for further consideration of the newly established affirmative defense. Considering that the Supreme Court applied this newly established affirmative defense in *Faragher*, which along with the *Ellerth* decision recognized the defense for the first time, then certainly it would be appropriate for the Seventh Circuit to apply the affirmative defense on appeal in this case.

CONCLUSION

AutoZone respectfully requests the Court to deny the Petition for the foregoing reasons.

Dated: December 3, 1999

Respectfully submitted,

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